

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

EnergyNorth Natural Gas, Inc.

v.

Civil No. 99-cv-049-JD

Century Indemnity Co., et al.

O R D E R

The defendants object to four witnesses listed by ENGI in its updated pretrial statement. The defendants contend that ENGI failed to disclose the witnesses in a timely manner and asks that they be excluded from testifying at trial as a sanction. ENGI has filed its response to the objection, stating that it intends to call at trial only two of those four witnesses, Theresa Demarais and Donald Rivard.

The defendants contend that ENGI should be precluded from calling Demarais and Rivard as witnesses at trial because they were not disclosed as part of ENGI's initial disclosures or in response to the defendants' interrogatories. Federal Rule of Civil Procedure 37(c)(1) provides that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence . . . any witness or information not so disclosed." See Poulis-Minott v.

Smith, 388 F.3d 354, 358 (1st Cir. 2004) (citing Klonoski, M.D. v. Mahlab, M.D., 156 F.3d 255, 269 (1st Cir. 1998)). The defendants argue that the witnesses were not disclosed in a timely fashion, that they are prejudiced by the late disclosure, and that the witnesses should be excluded from trial as an appropriate sanction.

ENGI explains that it was unaware of Demarais and Rivard until the deposition of Marie Paquette, which was taken by notice of the defendants on June 9, 2005. During her deposition, Marie Paquette mentioned Rivard and also mentioned George Pelletier's daughter, who is Theresa Demarais, when she was asked about children who had grown up near the plant site. Counsel for ENGI represents that Marie Paquette gave counsel for both sides Demarais's name and address after her deposition.

On October 6, 2005, counsel for the defendants asked ENGI's counsel to provide supplemental interrogatory answers by October 21, 2005. ENGI filed its updated pretrial statement, with Rivard and Demarais included in the witness list, on October 17, 2005. In addition, counsel for ENGI represents that supplemental answers were provided on October 21, 2005, as requested by counsel for the defendants. The defendants filed their objection to the new witnesses on October 20, 2005, a day before the deadline they had set for ENGI to provide supplemental

information.

Under these circumstances, ENGI has provided substantial justification for the late disclosure of Rivard and Demarais. Therefore, the mandatory sanction of Rule 37(c) will not be applied here. The court makes no ruling at this time on the admissibility of testimony from Rivard and Demarais, however, and cautions counsel for ENGI against offering cumulative or repetitive evidence.

SO ORDERED.


Joseph A. DiClerico, Jr.
United States District Judge

October 31, 2005

cc: John L. Altieri, Esquire
Richard T. Apiscopa, Esquire
Edmund J. Boutin, Esquire
Doreen F. Connor, Esquire
Bruce W. Felmly, Esquire
Robert P. Firriolo, Esquire
William P. Lalor, Esquire
Lawrence A. Serlin, Esquire